



NORTH CAROLINA

State Board of Elections & Ethics Enforcement

IN THE MATTER OF:)
Investigation of election) **ORDER OF PROCEEDINGS**
irregularities affecting counties)
within the 9th Congressional)
District)

As directed on the Notice of Date of Hearing, this matter will come before the State Board of Elections and Ethics Enforcement ("State Board"), however constituted as the body then-authorized to enforce G.S. §§163A-1180 and 163A-1181 or G.S. §§163-182.12 and 163-182.13, in a hearing to begin at 10 a.m. on January 11, 2019. The State Board will consider evidence and hear testimony in connection with an investigation into irregularities and alleged misconduct in certain counties within North Carolina's Ninth Congressional District. The proceedings affect the final certification of results in four contests in the 2018 general election: (1) U.S. Representative for North Carolina's Ninth Congressional District; (2) Seat 2 on the District Court in Judicial District 16B; (3) Bladen County Commissioner District 3; and (4) Bladen Soil and Water Conservation District Supervisor (together, the "Contests").

The Board on November 30, 2018, determined it was necessary to stay final certification of the latter three Contests because the apparent margin of victory in each race represents fewer votes than those under scrutiny in the State Board's investigation.

The hearing will commence at 10:00 a.m. in the courtroom of the North Carolina State Bar, located at 217 East Edenton Street in Raleigh, North Carolina.

The matter will be considered as follows:

Written Briefs

1. Candidates in the affected Contests shall have the opportunity to submit written briefs describing their positions on whether the State Board should either (a) certify their respective elections under G.S. § 163A-1184 (163-182.15) or (b) order that new elections be held under G.S. § 163A-1181 (163-182.13). All written briefs must be received by the State Board no later than 5:00 p.m. on January 6, 2019. Submissions must be filed electronically by email to legal@ncsbe.gov. See Paragraph 6 for distribution of materials.
2. Candidates with aligned interests are encouraged to coordinate among themselves to minimize duplication in their written briefs.
3. No brief may exceed 20 pages produced to conform with the font size and spacing specifications found in Rule 28(g)(1) of the North Carolina Rules of Appellate Procedure. Exhibits will not count against the maximum page count. Among other issues, the briefs should address the application of *In re Judicial Review by Republican Candidates for Election in Clay County*, 45 N.C. App. 556, 264 S.E.2d 338 (1980).
4. Statutory citations may reference section numbers either from Chapter 163A or Chapter 163, understanding that the proper citations are not easily obtainable through publicly available sources or subscription services. Parallel citations are encouraged but not required: “G.S. § 163A-1184 (163-182.15).” A conversion table is available at <https://goo.gl/19pRR4>.
5. General objections may be attached to the filed brief as an addendum, which shall not count against the page count specified in Paragraph 3. It will not be necessary to raise objections orally at the hearing if they have been filed as described. Such written objections shall be deemed under the State Board’s advisement once filed, and any objection not specifically sustained shall be deemed denied.
6. Given the compressed deadlines governing this matter, parties are not required to individually serve materials on each other. Rather, all briefing materials or supplemental orders shall be uploaded to the following online portal, and all parties shall be responsible to check the portal for updated

information: <https://goo.gl/GjxKh5>. Any party for whom online access poses a prejudicial burden shall petition the State Board in writing for an exception.

Documents

7. All candidates and other interested parties will continue to have access to relevant documents in the online portal first announced and made available by the State Board on December 4, 2018: <https://goo.gl/GjxKh5>. The State Board will continue to make documents available at that online portal at least through the January 11, 2019, and likely thereafter. Parties are encouraged to reference documents by the exhibit number identified in the portal.

8. All candidates and other interested parties who wish to submit affidavits or other pieces of evidentiary information may upload the same through a portal opened for that purpose until 5 p.m. on December 21, 2018: <https://goo.gl/forms/fVVyTBuLcgRNePxu1>. The deadline in no way obviates the deadline for production required under any subpoena issued by the State Board on this matter.

Order of Matters Presented at the Hearing

9. At the hearing, the State Board's staff will make an initial presentation regarding the underlying information learned in the course of their investigation.

10. After the initial presentation, the State Board chair will call witnesses and staff will examine those witnesses to develop the record on which the State Board will make factual findings necessary to certify the Contests, order new elections, and/or take other appropriate action.

11. Those witnesses will also be available for supplementary examination by State Board members and for cross-examination by counsel for candidates in the affected Contests, or by the candidates themselves if they are unrepresented.

12. Duplicative questioning will be severely restricted, and the State Board's Chair will retain discretion to limit questioning by time.

13. Candidates in affected Contests, either personally or through counsel, will have the opportunity to make their cases in chief after the State Board staff's presentation and calling of the staff's witnesses. The candidates, either personally or through counsel, will be allowed to call further witnesses, who will be subject to examination as described in Paragraphs 10, 11 and 12.

Evidentiary Standards

14. The hearing will not be subject to the North Carolina Administrative Procedure Act (the "APA"), but the Board will be guided by the criteria laid out in the APA. For example, hearsay evidence will likely be admitted if found to be reliable. *See, e.g., N.C. Dep't of Pub. Safety v. Ledford*, 247 N.C. App. 266, 290-91, 786 S.E.2d 50, 66 (2016). Articles from the news media may in some limited instances be admitted if offered for something other than the truth of the matter asserted. *See, e.g., State v. Locklear*, 322 N.C. 349, 360, 368 S.E.2d 377, 384 (1988). All regular exceptions to hearsay will apply, and the hearing is likely to include substantial testimony relaying statements against penal interest.

15. In no event, however, will the hearing "dispense with any essential element of a fair trial." *See Humble Oil & Ref. Co. v. Bd. of Aldermen of Town of Chapel Hill*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974). That is, in accordance with the procedures outlined above, (1) parties whose rights are being determined will be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver, the Board will not base findings as to the existence or nonexistence of crucial facts upon unsworn statements; and (3) crucial findings of fact that are "unsupported by competent, material and substantial evidence in view of the entire record as submitted" will not stand. *Id.*

16. This administrative hearing may involve information that affects other proceedings that bear on criminal or civil liability. The failure of an individual or entity to make themselves available for interview(s) following the request of the State Board, the failure of an individual or entity to produce all material either requested or subpoenaed by the State Board, and the failure of any individual or entity to attend the hearing pursuant to the terms of the State

Board's subpoena may permit the State Board members to draw adverse inferences against those individuals or entities. *See Nantz v. Employment Sec. Comm'n*, 290 N.C. 473, 478, 226 S.E.2d 340, 343 (1976) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

Attorneys Not Admitted to the North Carolina State Bar

17. Attorneys not admitted to the North Carolina State Bar who wish to appear at the hearing for candidates for election in the Races should submit applications to appear *pro hac vice* to legal@ncsbe.gov by 5 p.m. on January 6, 2019.

Deliberation & Ruling

18. The State Board members will deliberate in open session once the case is submitted, unless it convenes in closed session by majority vote for purposes permitted under G.S. § 143-318.11. The State Board will rule on the matter by vote in open session. A written order prepared by counsel and signed by the Chair will follow the vote, consistent with the regular practice of the State Board.

Attendance & Press

19. The hearing shall be open to the public, subject to the facility rules of the State Bar and all applicable occupancy and safety restrictions. Entry will be ensured for the parties, their counsel, witnesses, and for members of the press described in Paragraph 20. Members of the public will be admitted on a first-come basis. Time restrictions may be imposed by the Chair if necessary to accommodate public attendance.

20. All non-credentialed press must gain admittance alongside the public. To obtain press credentials, members of press must contact State Board Public Information Officer Patrick Gannon (Patrick.Gannon@ncsbe.gov), who shall exercise discretion in the issuance of credentials. Between one and three pool cameras will be permitted, within the discretion of P.I.O. Gannon and subject to the facility rules of the State Bar.

Maintenance of Order

21. The Chair may supplement portions of this Order, if deemed necessary and advisable. All parties, witnesses, and attendees are hereby placed on notice of the Chair's intent to exercise authority under G.S. § 163A-744 (G.S. § 163-24) to maintain order and to ensure adherence to the State Board's lawful commands:

The State Board shall possess full power and authority to maintain order, and to enforce obedience to its lawful commands during its sessions, and shall be constituted an inferior court for that purpose. If any person shall refuse to obey the lawful commands of the State Board or its chairman, or by disorderly conduct in its hearing or presence shall interrupt or disturb its proceedings, it may, by an order in writing, signed by its chairman, and attested by its secretary, commit the person so offending to the common jail of the county for a period not exceeding 30 days. Such order shall be executed by any sheriff to whom the same shall be delivered, or if a sheriff shall not be present, or shall refuse to act, by any other person who shall be deputed by the State Board in writing, and the keeper of the jail shall receive the person so committed and safely keep him for such time as shall be mentioned in the commitment. Provided, that any person committed under the provisions of this section shall have the right to post a two hundred dollar (\$200.00) bond with the clerk of the superior court and appeal to the superior court for a trial on the merits of his commitment.

This the 17th day of December, 2018.



Joshua D. Malcolm
Chair

CERTIFICATE OF SERVICE

I, Josh Lawson, general counsel to the North Carolina State Board of Elections & Ethics Enforcement, do hereby certify that I have this day served the foregoing documents upon the following by depositing the same into the care and custody of Federal Express for delivery to the recipients below:

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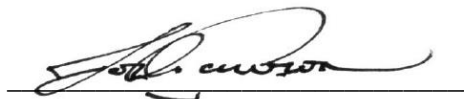
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This the 17th day of December, 2018.



Josh Lawson, General Counsel
N.C. State Board of Elections &
Ethics Enforcement